IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938

No. 38

JAMES G. GLOVER, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## BRIEF

**Of Respondent St. Louis-San Francisco Railway Company In Opposition.**

PAUL R. MOODY,
300 Frisco Building,
906 Olive Street,
St. Louis, Missouri,

DRAYTON T. SCOTT,
WILLIAM F. GARDNER,
CABANISS, JOHNSTON, GARDNER & CLARK,
901 First National Building,
Birmingham, Alabama,

Attorneys for Respondent, St. Louis-San Francisco Railway Company.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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### Cases Cited.

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## OPINIONS BELOW.

The opinion of the Fifth Circuit Court of Appeals below is set forth at page 51 of the Petition. The opinion of the District Court below appears at page 65 of the Petition.

## QUESTIONS PRESENTED.

(1) Does a federal district court have jurisdiction to hear and try the claim of a group of presently employed railroad employees based squarely on the employees' collective bargaining agreement before the employees present the claim to the National Railroad Adjustment Board?

(2) Must employees claiming a contract grievance under their collective bargaining agreement attempt to pursue contractual and intra-union remedies prior to asserting their grievance in a federal district court?

## STATEMENT.

This suit was instituted by fourteen employees of the Frisco Railroad alleging that they were entitled to certain promotional rights under the Frisco's collective bargaining agreement with the Brotherhood of Railway Carmen of America. Both the Frisco and the Brotherhood were named as defendants. Specifically the complaint stated that the plaintiffs, who were carmen helpers, were being denied an alleged right to work as carmen under the "Collective Bargaining Agreement as properly and customarily interpreted" (Petition, p. 58). The District Court dismissed the complaint stating in a memorandum opinion that it affirmatively appeared "from averments in the complaint that plaintiffs [had] not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board"[1] (Petition, p. 65).

The Fifth Circuit Court of Appeals in a panel composed of Judges Rives, Goldberg and Dyer affirmed unanimously the decision of the District Court.

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[1] Subsequently the petitioners amended their complaint in an effort to cure the defects found in it by the District Court. The District Court found that the amendment did not cure the defect and ordered the action dismissed.

## ARGUMENT.

At the outset it should be noted that the issues presented by the petition are substantially identical to those decided by the Eighth Circuit Court of Appeals in *Howard v. St. Louis-San Francisco Railway Company*, 361 F. 2d 905 (8th Cir. 1966), in which case this court last term denied certiorari. 385 U.S. 986 (No. 651, 1966).

The decision in the Fifth Circuit below affirming the dismissal is, moreover, clearly correct, being based both on the exclusive jurisdiction of the National Railroad Adjustment Board over petitioners' claim and on petitioners' by-passing the grievance procedure of their collective bargaining agreement and remedies within the Brotherhood. The decision based on both of these independent grounds is thoroughly in line with the applicable decisions of this Court. Furthermore, the decision presents no conflict with other decisions either within or without the Fifth Circuit. Accordingly, the petition in this case should be denied.

### I. The National Railroad Adjustment Board has exclusive jurisdiction over the claim made by the petitioners in this suit.

Since the claim which the petitioners would have had the District Court adjudicate is obscured by the racial discrimination charges which they argue in their brief, it is in order at the outset to consider this claim for what it is in fact.

The claim consists of petitioners' grievance that they are entitled to perform the work in question, that the assignment of the work to them is "required by the Collective Bargaining Agreement as properly and customarily interpreted," and that the alleged denial of work to them "has been contrary to previous custom and practice by defendants in regard to seniority" (Petition, p. 58).

In order to resolve this claim, therefore, it will be necessary to interpret and apply the collective bargaining agreement "as properly and customarily interpreted", determine the "previous custom and practice" which has been followed, and interpret and apply the terms of the agreement in regard to seniority.

The petitioners neither in their complaint nor in any other pleadings filed in the District Court made any allegation that they had made the least effort to present their claim made in this suit to the National Railroad Adjustment Board. Nor do they, nor can they, attempt to excuse this failure to resort to the Adjustment Board on their allegations that the Brotherhood takes a hostile attitude toward them. "There is no doubt that individual employees, such as plaintiffs here, whose interests viz a viz their employer are hostile to those of their union, have standing to present grievances to the Adjustment Board, irrespective of the union's position." *Thompson v. New York Central R. Co.*, 361 F. 2d 137, 143 (2d Cir. 1966).

The claim asserted here by petitioners which they did not present to the National Railroad Adjustment Board is clearly one over which the Adjustment Board has exclusive jurisdiction under this Court's decision in *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239, 244 (1950). The complaint shows patently that the claim in this case, as the claim in *Slocum*, requires "interpretation of an existing bargaining agreement. Its settlement [will] have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted [will] govern future relations of those parties." 339 U.S. at p. 242.[2]

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[2] Because the claim presented here involves the future working relationship between the railroad and its employees, it, just as the claim in *Slocum*, does not fall under the rule of *Moore v. Illinois Cent. R. Co.*, 312 U.S. 630 (1941) and *Walker v. Southern R. Co.*, 385 U.S. 196 (1966) that a discharged employee accepting

Faced with this clear mandate in *Slocum*, preventing jurisdiction in the District Court below, petitioners seek to show a "counter-balancing trend" of decisions which except their claim from the rule of *Slocum*. The cornerstone of this trend which petitioners labor to establish to relieve them from submitting the claim to the Railroad Adjustment Board is that line of cases commencing with *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).[3]

The fact is that this case could be regarded as being within the *Steele* principle only by completely disregarding both the established criteria of the *Steele* principle and the pages of the record which set forth the claim petitioners have asked the District Court to adjudicate.

On the one hand, the *Steele* line of cases stands for the proposition that the courts have jurisdiction where employees rely on a federal statute or the Constitution, complain of a breach of a union's fiduciary duty to represent them fairly, without discrimination, and where, to use this Court's words, "The claims . . . cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum . . . ." *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774 (1952).

The claim here against the Frisco on the other hand is a contract claim based squarely and solely on the collec-

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his discharge as final may sue for money damages without first presenting his claim to the Railroad Adjustment Board. This is simply not a discharge case.

[3] *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Graham v. Brotherhood of Railroad Firemen*, 338 U.S. 232 (1949); *Conley v. Gibson*, 355 U.S. 41 (1957).

tive bargaining agreement. It, thus on its face, falls outside the *Steele* decision, which decision expressly recites that in that case were no ". . . differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board." 323 U.S. at p. 205. And in *Conley v. Gibson*, 355 U.S. 41 (1957), the most recent case of this Court cited by petitioners to establish their so-called "counter-balancing trend," this Court stated ". . . the contract between the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent." 355 U.S. at p. 45.

Thus, it is clear that the "counter-balancing trend" which petitioners seek to establish to excuse their failure to resort to the Railroad Adjustment Board does not have any application to this case which calls directly for an interpretation of an existing collective bargaining agreement.

Petitioners' suggestion (Petition, pp. 46-47), that there is a conflict among the Circuit Courts of Appeal with respect to the jurisdiction of the Adjustment Board over a claim, such as the one here, is completely groundless. *Howard v. St. Louis-San Francisco R. Co.*, 361 F. 2d 905 (8th Cir. 1966, cert. denied 385 U.S. 986 (1967)), as petitioners suggest, is thoroughly in line with the decision below. *Brotherhood of Railroad Trainmen v. Central of Georgia R. Co.*, 305 F. 2d 605 (5th Cir. 1962), which petitioners cite as conflicting with *Howard* and the decision below, held squarely that a dispute between a railroad employee and his employer involving the interpretation of a labor contract "was exclusively the responsibility of the Railroad Adjustment Board." 305 F. 2d at 607. *Richardson v. Texas and New Orleans R. Co.*, 242 F. 2d 230 (5th Cir. 1957), another Fifth Circuit case which petitioners

claim to be out of line with *Howard* and the decision below explicitly recognized that, "Here, as in Steele, the allegations of the complaint require no interpretation or administrative application of the bargaining agreement within the special competence of the Adjustment Board, which forecloses judicial relief under Section 3 of the Act." 242 F. 2d at p. 234. The *Desrosiers*[4] case referred to by petitioners obviously presents no conflict in this regard as it did not even involve a claim by a railroad employee. The cases relied on by petitioners to show a conflict therefore present not a discordant but a harmonious pattern formed under *Slocum* and *Steele*.

In short the claim made in this case by these railroad employees against the railroad is one based directly and solely on the collective bargaining agreement. The interpretation growing from the claim clearly will govern the future relations between a large group of employees and the Frisco. This being the undisputed character of the claim, jurisdiction of the National Railroad Adjustment Board over the claim is exclusive under *Slocum*. The District Court therefore properly dismissed the complaint.

**II. The Courts below correctly held that petitioners' by-passing of the grievance procedure of the collective bargaining agreement and of remedies within the Brotherhood prevented jurisdiction in the District Court.**

The decision below is supported, moreover, on the independent ground that prior to instituting this action, petitioners by-passed the grievance procedure of the collective bargaining agreement and failed to avail themselves of existing remedies within the Brotherhood. This Court in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), stated:

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[4] *Desrosiers v. American Cynamid Company*, 377 F. 2d 864 (2nd Cir. 1967).

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.
>
> 379 U.S. at p. 652 (emphasis in text).

And in *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court repeated:

> Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.
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> 386 U.S. at p. 184.

To excuse their failure to utilize the grievance procedure under the collective bargaining agreement, petitioners allege that when they called upon the Brotherhood to process a grievance for them, no action was taken. Nowhere do petitioners allege, however, that any attempt was made to avail themselves of existing internal union remedies. Moreover, the amended complaint establishes petitioners' recognition of the fact that they could process the grievance themselves under the grievance procedure of the collective bargaining agreement. Yet again petitioners made no attempt to avail themselves of this path to settling their claim.

This failure of petitioners to utilize their contractual and internal union remedies clashes with well-established federal labor policy and creates, it is submitted, an independent ground supporting both the dismissal of the complaint by the District Court and the decision in the Fifth Circuit below.

## CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DRAYTON T. SCOTT,

WILLIAM F. GARDNER,

CABANISS, JOHNSTON, GARDNER & CLARK,
901 First National Building,
Birmingham, Alabama 35203,

PAUL R. MOODY,
906 Olive Street,
St. Louis, Missouri 63101,

Attorneys for Respondent,
St. Louis-San Francisco Railway Company.

### Certificate of Service.

I hereby certify that copies of the foregoing Brief for Respondent St. Louis-San Francisco Railway Company have been served on counsel by mailing copies by U.S. mail, postage prepaid, to Hon. William M. Acker, Jr., 600 Title Building, Birmingham, Alabama, and to Hon. Jerome A. Cooper, Cooper, Mitch & Crawford, Suite 1025 Bank for Savings Building, Birmingham, Alabama.

This the 8th day of April, 1968.

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Of Counsel.